92-1127

NO.

FILED
DEC 22 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN R. HELTON, JEFF L. HIRZEL,
JAMES W. LITTLE, PHILIP E. SNODDY,
MARVIN L. WYNN,
Each, Individually and as a partner of
Sooner Vista, a partnership,

PETITIONERS,

v.

F.D.I.C., Receiver for Victor
Savings and Loan Association,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS, DIVISION 4,
STATE OF OKLAHOMA

APPENDIX B
VOLUME II

R. M. HELTON
Counsel for Petitioners
713 Lamar Street
Wichita Falls, Texas 76301
Tel. 817-723-0729, 817-766-2828

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

65pp

INDEX APPENDIX "B" - OKLAHOMA APPELLATE COURT RECORD

Item No.	Description	Page
1.	First Amended Petition in Eerror	A-105
2.	Motion to retain	A-120
3.	Stipulation of Appellants and Appellees	A-125
4.	Order - Case assigned to Div 4, Court of Appeals	A-127
5,	Order - Motion to retain denied	A-128
6.	Subject Index - Original Brief of Appellants	A-129
7.	Subject Index - Reply Brief of Appellants	A-135
8.	Memorandum Opinion - Div. 4, Court of Appeals	A-146
9.	Petition for Rehearing (Excerpt)	A-151
10.	Order - Rehearing Denied	A-158
11.	Petition for Certiorari (Excerpt)	A-159
12.	Order - Certiorari Denied	A-167

APPENDIX B

ITEM #1

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FILED
JUL 30 1990

MIKE BARNETT, JOHN R. HELTON, JEFF L. HIRZEL, JAMES W. LITTLE, KENNETH E. MILLER, PHILLIP E. SNODDY, MARVIN L. WYNN, Each, individually and as a partner of Sooner Vista, a partnership,	)	No. 74513
APPELLANTS	)	
versus	)	
VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
APPELLEE	)	

FIRST AMENDED PETITION IN ERROR
(AND PRELIMINARY STATEMENT)

A. TRIAL COURT HISTORY

COURT: District CASE NO. C-85-371

COUNTY: Delaware JUDGE: Hon. Sam C. Fullerton

DATED JUDGMENT OR ORDER APPEALED PRONOUNCED:

November 8, 1989

POST TRIAL MOTION

(Kind)	(Date)
Motion to Reconsider the Order of September 6, 1989, sustaining plaintiff's Motion for Summary Judgment, and granting judgment, *in solido,* against appellants	September 15, 1989

DATE OF DIPOSITION OF POST-TRIAL MOTION

(Kind)	(Date)
Order Refusing to Reconsider	November 8, 1989

B. DISPOSITION IN TRIAL COURT

NATURE OF JUDGMENT OR ORDER APPELLANTS SEEK TO REVERSE: Order refusing to reconsider the Order orally uttered on September 6, 1989, sustaining plaintiff's motion for summary judgment and granting judgment, *in solido*, against appellants.

RELIEF SOUGHT BY APPELLANTS: By a timely filed Motion to reconsider, appellants sought an Order that, if granted, would have corrected as alleged harmful error in the order, orally uttered on September 6, 1989, sustaining plaintiff's motion for summary judgment, and granting judgment, *in solido,* against appellants. Appellants contended that the judgment *in solido* should have been a judgment *pro rata* and was, therefore not sustained by sufficient evidence and was contrary to law.

RELIEF GRANTED: The trial court refused to grant appellants any relief.

RELIEF SOUGHT BY APPELLEE: It requested the trial court to refuse to grant appelants any relief.

RELIEF GRANTED: The trial court agreed with appellee's request and refused to grant appellants any relief.

Attached as Exhibit "A" is a certified copy of the Order Refusing to Reconsider and correct the Orders of September 6, 1989.

C. SUMMARY OF CASE

It is summarized in Exhibit "B" attached herein and made a part hereof.

D. ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

They are stated in Exhibit "C" attached hereto and made a part hereof.

ANY RELATED OR PRIOR APPEALS

Yes

This Petition in Error is related to the Petition in Error filed in this Court on February 1, 1990. Its style is the same. Its Supreme Court file number is 74892

E. ARE APPELLANTS WILLING TO PARTICIPATE IN AN ATTEMPTED SETTLEMENT OF THE APPEAL BY PREDECISIONAL CONFERENCE UNDER COURT OF APPEALS RULE 3.7 IF OFFERED THE OPPORTUNITY?

NO

F. ARE APPELLANTS AGREEABLE TO ACCELERATED PROCEDURES FOR THIS APPEAL UNDER COURT RULE?

(Fast Track) NO

Why the appellants are not agreeable is specified in Exhibit "D" attached hereto.

G. NAME OF COUNSEL

(With telephone number and address)

ATTORNEY FOR APPELLANTS

Name:	R. M. Helton, OBA # 4066
Firm:	Solo Practitioner,
Address:	713 Lamar Street, Wichita Falls, TX, 76301
Telephone:	817-723-0729

ATTORNEY FOR APPELLEE

Name:	William D. Nay, OBA # 6588 R. Mark Petrich, OBA # 11956
Firm:	Hall, Estill, Mardwick, Cable, Golden & Nelson, P.C.
Address:	4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, OK, 74172-0154
Telephone:	918-588-2700

H. DATE: July 30th, 1990.

Verified by:

/s/ R. M. Helton

R. M. Helton,
Solo Practitioner,
713 Lamar Street,
Wichita Falls, TX 76301
817-723-0729

I. AFFIDAVIT OF SERVICE TO APPELLEE AND DISTRICT COURT CLERK ON DAY OF FILING IN SUPREME COURT

I hereby certify that a true and correct copy of the above and foregoing First Amended Petition in Error was hand delivered on the 31 day of July, 1990, to William D. Nay and R. Mark Petrich, Esquires, 4100 Bank of Oklahoma Tower, 1 Williams Center, Tulsa, OK, 74172-0154, by depositing it in the U.S. Mails, postage prepaid.

I further certify that copy of the above and foregoing First Amended Petition in Error was filed in the Office of the Court Clerk of Deleware County on the 1st day of August, 1990.

/s/ R. M. Helton

R. M. Helton,
counsel aforesaid.

Exhibit "A", attached to the First Amended Petition In Error and Preliminary Statement.

(Copy of Certified Copy of the Order in Question. Original Certified Copy annexed to the Original Petition in Error.)

Three Pages

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
NOV 13 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; et al.,	)	
Defendants.	)	

ORDER

The Defendants, Hirzel, Little, Helton, Wynn, Snoddy, Barnett, and Miller, Motion to Reconsider the Court's granting of FSLIC's Motion for Summary Judgment and the Response thereto came on for hearing before said Court at its regular Motion Docket on November 1, 1989. The Defendants appear by their attorney, Joel R. Hogue, and the Plaintiff (Respondent) appears by its attorney, R. Mark Petrich.

Since the initiation of this action, Victor Savings and Loan Association was declared insolvent by the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed as Receiver.

This matter was heard before this Court on September 6, 1989, ans at that time the Court granted

judgment in favor of the FSLIC against Sooner Vista and also decreed the foreclosure of the real estate securing the indebtedness. In addition, the Court granted judgment against These Defendants, as well as John Steven Hope and Jim Biffle, for percentage of liability set forth in certain guaranty agreements executed by These Defendants and Hope and Biffle and, also granted judgment against These Defendants and Hope and Biffle for any indebtedness of Sooner Vista to the FSLIC that is not discharged through the sale of all partnership assets, most notably the condominium securing the indebtedness.

The Defendants maintain that the Court erred in granting judgment against These Defendants either as partners or as guarantors of the indebtedness for at least two reasons. First, the Court erred in failing to limit the liability of the partners to the percentages set forth in certain guaranty agreements because the obvious intention, as indicated by a proper interpretation of the writings executed by the parties, is that the guaranty agreements were executed for the purpose of limiting the individual partners' liability to the percentages set forth in their respective guaranty agreements. Second, there are material questions of fact remaining regarding whether the execution of a second promissory note by Jim Biffle operated as a novation which would have the effect of substituting Biffle, or the new Sooner Vista Partnership composed of Biffle and Hope, for and in the place of These Defendants, who by that time were no longer partners in Sooner Vista.

In addition to the above, the Defendants maintain in a Supplement to their Brief in support of the Motion to Reconsider that Plaintiff's Motion for Summary Judgment should be denied for the further reason that one of the partners, Royce Hammons, was released from liability by Victor Federal Savings and Loan Association on January 14, 1985. They maintain that the Release by Victor of

Hammons on his liability also constitutes a release of the other partners including These Defendants.

Both sides of all issues have been well briefed by counsel and the Court finds that further recitation of the facts is unnecessary. The facts are basically undisputed. The partners ("These Defendants") allege two defenses:

1. Release,
2. Novation,

in addition to the defense asserted above.

The Court in granting Plaintiff's Motion for Summary Judgment relied upon the doctrine established in the case of *D'Oench, Duhme & Company v. F.D.I.C.*, 315 U.S. 447 (1942), and 12 U.S.C.A. Section 1823(e). This principle prevents and estops those who execute and deliver promissory notes and/or guaranties to federally insured banks from raising defenses against a bank's duly appointed Receiver based on oral agreements with officers of failed banks.

The Court finds that based upon the D'Oench-Duhme Doctrine, the defenses raised by the partners are insufficient as a matter of law.

The Court further finds and reaffirms that there are no substantial fact questions raised by the Defendants in their Motion to Reconsider that would justify submitting this case to a jury, and that by reason thereof, the Defendant's Motion to Reconsider should be denied.

The Court would further adopt the argument and authority of the Plaintiff in all of its briefs on file herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendant's Motion to Reconsider be and the same is hereby denied, to which ruling the Defendants are granted an exception.

DATED this 8th day of November, 1989.

/s/ Sam C. Fullerton

SAM C. FULLERTON
District Judge

CERTIFICATE OF MAILING

I hereby certify that I did mail a true and correct copy of the above and foregoing Order via prepaid first class mail on this 8th day of November, 1989, to the following interested parties, to-wit:

Mr. Joel B. Hogue, Attorney at Law, GABLE & GOTWALS, P.C., 2000 Fourth National Bank Building, 15 West Sixth Street, Tulsa, Oklahoma 74119-1217;

Mr. Robert Jenkins, Assistant District Attorney, Delaware County Courthouse, Whitehead and Krause Streets, P. O. Box 309, Jay, Oklahoma 74346;

Mr. Jim Biffle, 7524 South Harvard Place, Tulsa, Oklahoma 74136;

Mr. James Hicks, Attorney at Law, MORRELL & WEST, 1717 South Boulder Street, Suite 800, Tulsa, Oklahoma 74119;

Mr. Dale F. McDaniel, 2250 East 73rd Street, Suite 200, Tulsa, Oklahoma 74136;

Mr. Mark Petrich, Attorney at Law, HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, Oklahoma 74172.

Delaware County, /s/ Lynna L. Tomlin

5th day of December, 1989.

Deputy

EXHIBIT "B", attached to the first amended Petition in Error and Preliminary Statement.

This action was filed by a solvent Thrift, the first lender. It was a suit to foreclose on a partnership real estate mortgage and for debt arising from the partnership mortgage note and nine so-called 'guaranty agreements' signed by the nine partners of the borrower. Appellants are seven of the original nine partners. The first Thrift became insolvent. A 'take-over' new Thrift was substituted as plaintiff. It (Victor S. & L. Assn.) became insolvent and FSLIC, as its receiver, became the third substantial plaintiff.

FSLIC, receiver, the appellee, amended the original petition. Appellee alleged its federal status. No substantial change in the original claim was stated, except the 'status' of the promisors in the nine guaranty agreements were alleged to have been as 'individuals' and not as 'partners'.

Appellee filed a motion for summary judgment *on its amended petition.* The motion was made under Rule 13 of the District Court Rules. The motion was supported by a *brief.* The brief contained exhibits. The brief extensively cited the following federal laws: the FSLIC Insurance Act of 1938, as amended; 12 U.S.C. § 1823(e), a part of the FDIC Insurance Act of 1950, as amended; *D'Oench Etc.,* a U.S. Supreme Court case; numerous U.S. District and Circuit Court opinions. The brief contended that *all* 'defenses' available to appellants under state law were by this mass of federal law, barred. Appellee in its briefs contended that the term 'defenses' included the question of *intended* liability of appellants and intended 'status' of appellants as promisors in the nine 'guaranty' agreements. That is, that such questions as the *intent* of the contracting parties as reflected from the *loan papers sued on* was a 'barred

defense' by the cited federal law. *Summarily,* the trial court agreed and held that as a matter of this federal law that there were no disputable genuine material questions of fact. The trial court granted a summary judgment against appellants for *all* relief appellee sought. The trial court refused to reconsider appellants' request for corrected relief. This appeal followed.

EXHIBIT "C", attached to the Amended Petition in Error and Preliminary Statement.

Errors proposed to be raised on appeal.

1. The trial court erred in granting the appellee a summary judgment on September 6, 1989.

2. The trial court erred in overruling appellants' motion to reconsider on November 8, 1989.

3. These errors were fundamental, constitutional law errors.

4. These trial court errors invaded appellants' state and federal due process rights under Amendments numbered V and XIV, U.S. Constitution, and Art. 2, § 7, Oklahoma Constitution.

5. These trial court errors invaded appellants' rights under Art. VI and Amendments VII and X, U.S. Constitution, and Art. 2, § 19, Oklahoma Constitution.

Issues proposed to be raised on appeal.

Threshold Issue:

Whether or not the interlocutory finding/order of the trial court, made on September 6, 1989, was jurisdictionally null and void:

1. because the trial court never had any federal law claim and its remedy as the subject matter of its jurisdiction in the exercise of its federally conferred concurrent federal law jurisdiction; and/or,

2. because the trial court was never authorized by federal law to limit the scope of Oklahoma law's object to be achieved by Rule 13 [summary judgment rule] and the trial court's mandatory duty under the rule to determine whether there was any genuine, material disputed facts on issues essential to appellee's right to a summary judgment under Oklahoma law.

Ultimate Issue:

Whether or not the summary judgment granted in this case on September 6, 1989, was the poisoned fruit of a state and federal unconstitutionally null and void interlocutory finding/order of the trial court, made on September 6, 1989, that precluded the appellants from the use of all of their state law claim?

Specific constitutional law issues:

A. Whether the right to jury trial, guaranteed to the appellants by Amendment VII, Bill of Rights, U.S. Constitution, and Art. 2, § 19, Oklahoma Constitution, has, by the trial court, been denied to the appellants?

B. Whether appellants' right to trial by an Oklahoma trial court that would exercise all judicial power reserved to Oklahoma by Amendment X, Bill of Rights, U.S. Constitution, has, by the trial court, been denied to the appellants? This issue arises from the fact that the trial court refused to determine the intention of the parties to the loan contracts sought to be enforced by the appellee. The upward ultimate source of this failed judicial duty had its origin in Amendment X.

C. Whether appellants' right to the benefits of a trial court that would apply and enforce the supreme court of the land guaranteed to appellants under Art. VI, U.S. Constitution, has, by the trial court been denied to appellants? The trial court in making the interlocutory finding/order and its resulting summary judgment disregarded and did not enforce Amendments V and VII of the Bill of Rights and Amendment XIV, U.S.. Constitution, and thereby failed to enforce the supreme law of the land, commanded by Art. VI.

D. Whether state and federal procedural and substantive due process of law has, by the trial court, been denied to appellants by the following itemized acts of the trial court:

1. The trial court never determined the intention of the parties to the contracts sued on under Oklahoma law.
2. The trial court never determined whether there was any genuine material disputed questions of fact surrounding that intent—an essential element of appellee's prima facie case under Oklahoma law.
3. The trial court determined that federal law precluded it from deciding either question—that is, intent as a 'merit' trial question or intent as a summary judgment question—disputed or not as to the evidence.
4. By answer, the appellants' requested the trial court to compel appellee to prove that its exhibits—the documents sought to be enforced—intended and meant what appellee alleged that they meant. The trial court refused to lend its ear to this request.
5. The trial court accepted, *ex parte,* unilaterally the intent alleged by the appellee. Appellee never had to prove its case.

6. The trial court denied to the appellants any right to be heard before being condemned.
7. The trial court denied to the appellants the right to contest with the appellee on the issue joined for trial by the pleadings.
8. The trial court permitted the appellee to become both litigant and trial judge. The appellee determined the intent question.
9. The trial court surrendered to the appellee the judicial power conferred upon it by the sovereign that created the court and the judge thereof—the duty to decide the contract intent under Oklahoma law.
10. The trial court denied to the appellants a right to trial of facts constituting the basis of the federal right claimed by appellee by a brief—not by any pleadings.
11. The trial court assumed a jurisdictional power that it had that was never invoked by the appellee. It was a special statutory power from a different sovereign, the U.S. The federal statutes had no connection to the loan contracts, the subject matter of the trial court's general jurisdiction.
12. The trial court denied to appellants a trial of the subject matter of which it had jurisdiction in the due and ordinary course of proceeding.
13. The trial court denied to the appellants a right to jury trial.
14. The trial court had no authority to apply federal law to Rule 13, the Oklahoma summary judgment rule.
15. The unconstitutional null and void interlocutory finding/order and its poisoned fruit, the summary judgment, invaded the appellants' property rights.

The 'ordinary', 'general', 'subject matter jurisdiction' of the trial court never extended to or authorized the above described judicial procedure.

EXHIBIT "D", attached to the amended Petition in Error and Preliminary Statement.

1. The first reason is that the Rule itself gives my clients the right to decline.

2. The second reason is that if my clients and I consent, we have agreeably WAIVED our right, under the Oklahoma Constitution and the long history of Oklahoma to have appeal courts that do not 'fast track". In my opinion and judgment, the people of Oklahoma, when it was formed as a State and the Constitutional judicial system was adopted, the people never then intended to have a 'fast track' appeal court. In addition, I do not think that that ancient intent has ever changed.

3. The third reason is that I have tried it one time. And, never again for me.

Respectfully submitted,

/s/ R. M. Helton

R. M. Helton, appellants'
Counsel of record.

ITEM - 2

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

FILED
JUL 30 1990

MIKE BARNETT, et al, appellants,	)	
	)	
vs.	)	
	)	NO.
VICTOR S. & L. ASSN., appellee.	)	74513

MOTION TO RETAIN
(Rule 1.16(c)(a) & (c)

To the Honorable Chief Justice of said Court:

Appellants move the Supreme Court to retain jurisdiction and review this case for the following reasons:

First - Subsection "(a)"
(First Impression Questions)

1. Whether *briefs* of FSLIC/FDIC can invoke an Oklahoma District Court's concurrent federal law jurisdiction under 12 U.S.C. § 1725(C)(4) [as to FSLIC] and 12 U.S.C. § 1819 (4th) [as to FDIC] for a federal law claim and remedy subject matter, arising under the FSLIC Insurance Act of 1938, as amended, and the FDIC Insurance Act of 1950, as amended, including specially, 12 U.S.C. § 1823-(e), of the latter act? [The former act was repealed and the later act was last amended by the FIRRE Act (Of Congress) of August 9, 1989.] Included in the question are two U.S. Supreme Court cases: *D'Oench Duhme & Co. v. FDIC,* (1942), 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956; *Langley v. FDIC,* (1987), 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340.

2. Whether Rule 13 of the District Court Rules and especially sub-section "(e)" means and refers *only* to Oklahoma law when the *only* subject matter jurisdiction invoked in an Oklahoma District Court was its *general* common law jurisdiction, to-wit: Action to foreclose a real estate mortgage on Oklahoma land, and, debt default of the mortgage note and nine concurrently made so-called 'guaranty agreements', all of which were contemporanously closin (sic) Oklahoma at the office of a federally insured Thrift, and all were performable in Oklahoma?

3. Alternative statement of question number "2". Whether Rule 13 of the District Court Rules and especially sub-section "(e)" means and refers also to a federal law claim and remedy asserted in a *brief* of the FSLIC, receiver, concurrently filed in support of a Rule 13 motion for summary judgment, when, on the day of filing the motion and supporting brief, the then pending petition of FSLIC, receiver, had only invoked the district court's *general* common law subject matter jurisdiction? The motion for summary judgment, when filed, wa *not* a motion for summary judgment on any *pending* federal law claim and remedy.

Second - Sub-section "(c)"
(Constitutional claims)

1. Amendment VII, U.S. Constitution; Art. 2, § 19, Oklahoma Constitution. The right to jury trial has been denied to the appellants by the action of the trial court (TC) in granting appellee a summary judgment.

2. Amendment X, U.S. Constitution. Appellants' right to trial by an Oklahoma TC that would exercise all judicial power reserved to Oklahoma was denied to the appellants. The TC's refusal to determine the intent of the parties to the loan contract sought to be enforced by the appellee in the district court of Delaware County, invaded

that constitutional right. The appellee became both plaintiff and trial judge. It determined, *ex parte,* the contract intent.

3. Art. VI, U.S. Constitution. In making the interlocutory finding/order authorized by federal law and its operation, the summary judgment was contrary to Art. VI, in that the Supreme law of the land, Amendments V, VII & XIV were disregarded and not enforced by the TC.

4. Art. V & XIV, Bill of Rights, U.S. Constitution and Art. 2, § 7, Oklahoma Constitution. The judicial action of the TC in rendering the interlocutory finding/order of September 6, 1989, was an act of the TC that was *corum non judice* and void. Its resulting FRUIT, the summary judgment of September 6, 1989, was also *corum non judice* and void. The null and void TC acts denied to the appellants procedural and substantive due process of law, as follows:

a. The TC never determined the intention of the parties.
b. The TC never determined whether there was any material disputed questions of fact surrounding that intent.
c. The TC determined that federal law precluded it from deciding either question—that is, intent as a 'merit' question or intent as a summary judgment question—that is, disputed or not as to the evidence.
d. By answer, the appellants' requested the TC to compel appellee to prove that its exhibits—the documents sought to be enforced—intended and meant what appellee alleged that they meant. The TC refused to do so.
e. The TC accepted, *ex parte,* unilaterally the intent alleged by the appellee. Appellee never had to prove its case.
f. The TC denied to the appellants any right to be heard before being condemned.

g. The TC denied to the appellants the right to contest with the appellee on the issue joined for trial by the pleadings.
h. The TC permitted the appellee to become both litigant and trial judge. The appellee determined the intent question.
i. The TC surrendered to the appellee the judicial power conferred upon it by the sovereign that created the court and the judge thereof—the duty to decide the contract intent.
j. The TC denied to the appellants a right to trial of the facts constituting the basis of the federal right claimed by appellee by a brief—but by any pleading.
k. The TC assumed a jurisdictional power that it had that was never invoked by the appellee. It was a special statutory power from a different sovereign, the U.S. The federal statutes had no connection to the loan.
l. The TC denied to appellants a trial of the subject matter of which it had jurisdiction in the due and ordinary course of proceeding.
m. The TC denied to the appellants a right to jury trial.
n. The TC had no authority to apply federal law to Rule 13 the Oklahoma summary judgment rule.
o. The TC has permitted the appellee to invade their property rights unlawfully.

Respectfully submitted,

/s/ R. M. Helton

R.M. Helton, OBA # 4066,
Solo practitioner,
713 Lamar Street,
Wichita Falls, TX 76301,
Tel. # 817-723-0729,
Appellants' counsel.

CERTIFICATE OF SERVICE

I, R. M. Helton, counsel aforesaid, hereby certifies that on July 31, 1990, that he hand delivered a copy of the above and foregoing Motion to E. Mark Petrich, Esq., attorney for appellee, at his law office in Tulsa, Oklahoma, at 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, Oklahoma, 74172-0154.

/s/ R. M. Helton

R. M. Helton,
Counsel aforesaid.

ITEM # 3

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
AUG 15 1990

MIKE BARNETT, ET AL,.	)	
	)	
Appellants,	)	
	)	
vs.	)	
	)	NO.
VICTOR SAVINGS AND LOAN ASSOCIATION,	)	74513
	)	
	)	
Appellee.	)	

STIPULATION OF APPELLANTS AND APPELLEE

TO THE HONORABLE CHIEF JUSTICE OF SAID COURT:

The Appellants, through their counsel of record R. M. Helton, and the Appellee, through its counsel of record R. Mark Petrich, hereby stipulate as follows:

1. Pursuant to the enactment of the Financial Institutions, Reform, Recovery and Enforcement Act of 1989, Public Law 202-73, which was enacted on August 9, 1989, the Federal Savings and Loan Association ("FSLIC") was abolished and the Federal Deposit Insurance Corporation ("FDIC") became Manager of the FSLIC Resolution Fund and succeeded to all rights, titles and interest of the FSLIC as receiver for Victor Savings and Loan Association ("Victor").

2. The FDIC as receiver for Victor should, therefore, be substituted in this action as the Appellee in place of the FSLIC as receiver for Victor.

Dated this 9th day of August, 1990.

/s/ R. M. Helton

R. M. Helton
713 Lamar Street
Wichita Falls, Texas 76301

ATTORNEY FOR
APPELLANTS

/s/ R. Mark Petrich

R. Mark Petrich
Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR APPELLEE

ITEM # 4

IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA

Filed
SEP 16 1991

The following cases stand assigned to Court of Appeals, Division 4, Kenneth D. Bacon, Presiding Judge, John F. Reif, Judge, and Ronald J. Stubblefield, Judge:

74,513 FDIC, Receiver for Victor Savings and Loan Association, v. Mike Barnett, et al.

The proceedings to be conducted are henceforth to be governed by the Rules of Practice and Procedure in the Court of Appeals and on Certiorari to the Supreme Court, 12 O.S.1981, ch. 15, app. 3.

Until the Court of Appeals, Division 4, has made its final disposition of an asigned case, all motions, petitions for rehearing, as well as other paperwork, must be filed with the Clerk of the Supreme Court who serves *ex officio* as the Clerk of the Court of Appeals, Room 1, State Capitol, Oklahoma City, Oklahoma.

DONE BY THE COURT OF APPEALS THIS 12th day of September, 1991.

/s/ JOHN F. REIF

JOHN F. REIF
Acting Vice Chief Judge

A-128

ITEM # 5

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Filed
NOV 26 1990

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

74,513 Federal Deposit Insurance Corporation Receiver for Victor Savings & Loan Association v. Mike Barnett, John R. Helton et al. Appellants' motion to retain denied.

ITEM # 6

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

FILED
JUL 30 1990

MIKE BARNETT, ET AL, appellants,	)	
	)	
vs.	)	
	)	NO.
FDIC, Receiver for Victor Savings and Loan Association, appellee.	)	74,513

MORTGAGE FORECLOSURE AND DEBT SUIT

APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY, OKLAHOMA, HONORABLE SAM C. FULLERTON TRIAL JUDGE No. C-85-371

ORIGINAL BRIEF OF THE APPELLANTS

ROBERT M. HELTON,
OB No. 4066
713 Lamar Street
Wichita Falls, Texas 76301
Tel. No. 1-817-723-0729
Counsel for Appellants.

SUBJECT INDEX

Abstract of the record-Part 1 1
Part 2 6

Specification of errors v

1. The trial court erred in granting the appellee a summary judgment of September 6, 1989, R. pg. 229

2. The trial court erred in overruling appellants' motion to reconsider on November 8, 1989, R. pg 225

3. These trial court errors invaded appellants' state and federal due process rights under Amendments Numbered V and XIV, U.S. Constitution and Art. 2, § 7, Oklahoma Constitution . . . . . .

4. These trial court errors invaded appellants' rights under Art. VI, Amendments VII, and X, U.S. Constitution and Art. 2, § 19, Oklahoma Constitution.

Threshold Question v

Whether or not the interlocutory finding/order of the trial court, made September 6, 1989, was jurisdictionally null and void: . . . . . .

1. because the trial court was never authorized by federal law to limit the scope of Oklahoma law's object to be achieved by Rule 13 and trial court's mandatory duty under the rule to detemine whether there was any genuine, material disputed facts on issues essential to appellee's right to a summary judgment under Oklahoma law.

Ultimate Question v

Whether or not the summary judgment granted in this case on September 6, 1989, was the poisoned fruit of a state and federal unconstitutionally null and void interlocutory finding/order of the trial court, made on September 6, 1989, that precluded the appellants from the use of all of their state law cliams? .....

Contentions, Argument and Authorities-Part 1

The subject matter jurisdiction laws stated in *Osage Oil & Refining Co. v. Interstate Pipeline Co.* (1927) 124 Okl. 7, 253 P.66, apply and control this case 7

Contentions, Argument and Authorities-Part 2

The procedural jurisdiction laws stated in *Howard v. Duncan,* (1933), 163 Okl. 142, 21 P.2d 489, apply and control this case 9

Reeves v. Agee, Okl., 769 P.2d 745 11

Other cited jurisdiction laws apply and control this case 11

State v. Whitehead, (1955) 151 Me. 135, 116 A.2d 618 11

City of New Orleans v. Di Benedetto, La. App. (1962), 144 So.2d 558 11

Riseley v. Phoenix Bank of City of New York (1880), 83 N.Y. 318, 38 Am. Rep. 421 15

Bowles, Admr. v. The Barde Steele Co., (1945), ____Or.____,164 P.2d 692, 162 A.L.R. 328 12,14,16

Pan American Petr. Corp. v. Superior Court of Del., (1961) 366 U.S. 656, 81 S. Ct. 1303, 6L.Ed.2d 584 13,16

12 U.S.C. §§ 1725(C)(4)and 1819(4th) 12

Quotation from the *Bowles, Admr.* case 12

Quotation from the *Pan American case* 13

Quotation from the *Bowles, Admr.* case 14

Quotations from Freeman on Judgments, 5th Ed. Vol. 1, § 337, pgs. 675, 677, citing *Lewis v. Gillard*, (1918) 70 Okl. 231, 173 P. 1136 16

Quotation from the *Lewis* case 16

Quotation from Freeman Judgment, 5th Ed. Vol. 1, § 338, pg. 678 17

Reynolds v. Stockton, (1887) 43 N.J. Eq. 211, 3 Am. St. Rep. 305, 10 Atl. 385, with quotation 17,18

Seamster v. Blackstock, (1887) 83 Virginia 232, 5 Am. St. Rep. 262, with quotation 18,19

Continuation of quotation from Freeman on Judgments, 5th Ed. Vol. 1, § 338, pg. 678 20

Id §338, pg. 679 20

Id §338, pg. 680 20

Id §355, pg. 737 20

Id §355, pg. 738 21

Id §355, pg. 738 21

Contentions, Argument and Authorities-Part 3(A)

Under Oklahoma law, there was genuine material, and relavant disputed evidence on an issue essential to appellee's right to summary judgment. 22

Tigert v. Admiral Corp., (1979) Okl. App. 612 P.2d 1381 22

Williston on Contracts, Rev. Ed. 1938, § 863, pg. 745 24

Tigert v. Admiral Corp., supra 25

Bowles, Admr. v. Barde Steele Co., supra, pgs. 342-346 of 162 A.L.R. 26,27

Contentions, Argument and Authorities-Part 3(B)

The TC had no authority to alter Rule 13 by applying federal law to it. Mandatorily, the TC had to use Oklahoma law in applying Rule 13 27

Contentions, Argument and Authroities-Part 4

The constitutional claims of the Appellants.

Claims under Amendment VII, U.S. Constitution and Art. 2, § 19. Oklahoma Constitution, Jury trial denied 28

Claims under Amendment X, U.S. Constitution. Appellants' right to trial by an Oklahoma TC that would exercise all judicial power reserved to Oklahoma was denied to the appellants 28

Claims under Art. VI U.S. Constitution. In making the interlocutory finding/order, the summary judgment was contrary to Art. VI, in that the supreme law of the land, Amendments V, VII & XIV were disregarded and not enforced by the TC 28

Claims under Arts. V and XIV, Bill of rights, U.S. Constitution and Art. 2, § 7, Oklahoma Constitution. The interlocutory finding/order and the fruit thereof, the summary judgment, were devoid of due process of law 28,29

Scott v. McNeal, (1904), 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896 29

Contentions, Argument and Authorities-Part 5

Appellants' closing argument 30

1. The TC had no jurisdiction to render the interlocutory finding/order or the summary judgment 30

   The TC's order refusing to reconsider quoted from a sentence in appellee's brief 30

   Element number 3 of Freeman's 3 elements is missing 31

2. The TC had no authority to apply federal law to Rule 13. It was the TC's mandatory duty to use Oklahoma law in applying Rule 13 . . 31,32

Bowles, Admr. case, supra, quoted pg. 352 of 162 A.L.R. 31

Id., supra, quoted pg. 342 of 162 A.L.R. 32

Relief requested 32

Certificate of service 33

ITEM # 7

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

FILED
OCT 15 1990

MIKE BARNETT, ET AL, appellants,	)	
	)	
vs.	)	
	)	NO.
FDIC, Receiver for Victor Savings and Loan Association, appellee.	)	74,513

MORTGAGE FORECLOSURE AND DEBT SUIT

APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY, OKLAHOMA, HONORABLE SAM C. FULLERTON TRIAL JUDGE No. C-85-371

REPLY BRIEF OF THE APPELLANTS

ROBERT M. HELTON,
OB No. 4066
713 Lamar Street
Wichita Falls, Texas 76301
Tel. No. 1-817-723-0729
Counsel for Appellants.

SUBJECT INDEX

Page

I.

THE FIRST SENTENCE, QUOTED HEREAFTER, OF PART II-A, OF APPELLEE'S ANSWER BRIEF, PG. 5, UNDERSCORES ITS FLAWED CONTENTIONS ARGUMENT AND AUTHORITIES 1

"Appellants, in a convoluted and unclear manner, argue in the brief-in-chief that the Trial Court did not have subject matter jurisdiction over the action to apply the doctrine established in *D'Oench, Duhme & Co. v. FDIC****to reject the defenses* asserted by the Appellants." *(Emphasis added.)* 1

In the quoted sentence, appellee has mislabeled and has misconceived, and thus misdescribed as '*defenses*' of appellants, matter that was appellee's jurisdictionally affirmative burden 1

Riverside Park Realty Co. vs. FDIC, 1987, M.D. Tenn. 465 F. Supp. 305, 321 *et seq.* 2

That major flaw is the contention, claim and assertion that the question of contract intent was a 'defense'. Appellee could not 'bootstrap' appellants' right to require appellee to prove its alleged claim into a 'defense' posture 2

II.

THERE IS GENERATED THE FOLLOWING QUESTION OF LAW FROM THE DIVERSE VIEWS OF APPELLANTS AND APPELLEE.

IN AN OKLAHOMA COMMON LAW COURT WITH GENERAL COMMON LAW JURISDICTION, IN AN OKLAHOMA COMMON LAW CONTRACT CLAIM CASE, DOES THE PLAINTIFF HAVE THE BURDEN TO PLEAD, AS AN ESSENTIAL ELEMENT OF THE CLAIM, THE INTENT OF THE PARTIES TO A WRITTEN CONTRACT AND TO PROVE THAT THE WRITTEN CONTRACT SUPPORTS THE INTENT ALLEGED? 3

It is an old and familiar "Hornbook" contract common law that the answer to this question is a very firm 'yes' 3

III.

IT IS UNDISPUTED AND PROVED IN THIS COURT THAT THERE WERE TWO KINDS OF RELIEF GRANTED BY THE TRIAL COURT:
(1) OKLAHOMA COMMON LAW CONTRACT RELIEF AND
(2) SPECIAL LIMITED STATUTORY RELIEF 3

Among others, one of the appellants' COMPLAINT in this Court is about relief in case class '(2)' above 4

Osage Oil & Refining Co. vs. Interstate Pipeline Co., 1927, 124 Okl. 7, 253 P. 66 4

IV.

PLEADING LAW IS NOT THE SOURCE OF JURISPRUDENCE OF JURISDICTION. THE JURISPRUDENCE OF JURISDICTION PROVIDES WHAT MUST BE PLED IN STATUTORY CLAIMS. 5

Federal Rule 8 equals 12 OSA § 2008 5

Davis v. Passman, 442 U.S. 228 (1979) 5

Original Ballet Russe v. Ballet Theatre, 133 F.2d 187, 189 5

Footnote 15 in *Davis v. Passman* 6

U.S. v. Employing Plasterers Ass'n, 347 U.S. 186 ... 6

12 OSA § 559, held unconstitutional in *Puckett v. Cook*, 1978, Okl. 586 P.2d 721 6

Marberry v. Madison, US Supreme Court, (citation not required—well known case.) 6

Rule 3, (Dist. Ct. Rules) 7

Riverside Bank Realty Co. vs. FDIC, supra 7

V.

SIX MATTERS, STATED IN THIS PART, ARE FACTS THAT APPELLEE KNEW OR SHOULD HAVE KNOWN.

KNOWING THESE SIX MATTERS, 12 OSA § 2011 COMMANDED APPELLEE TO ADVISE THE TRIAL COURT AND THIS COURT, IN WRITING, THAT IT CONTENDED THAT KNOWN PRIOR LAW SHOULD EITHER BE OVERRULED OR DISTINGUISHED.

APPELLEE HAS FAILED IN THIS DUTY. IN SO FAILING IN THIS DUTY, THE ENTIRE POSITION OF APPELLEE IN THIS COURT IS BOTH UNTENABLE AND FRIVOLOUS 8

1. The jurisdictional facts of § 1823(e) and the *D'Oench* case doctrine 8

2. The Okla. contract common law claim of the petition relied solely upon the loan asset papers and not upon any collateral matter 8
3. MR. JUSTICE JACKSON'S admonition statement in his *D'Oench* case opinion 8
4. Chief Dist. Judge MORTON'S statement in *Riverside Park Realty Co. v. FDIC* 8
5. There must be a 'justiciable matter' in appellee's federal law claim. Art. 7 § 7, Oklahoma Constitution 8
6. That appellee had no standing to sue from numerous decisions of this Court, including *Southwestern Bell Tel. Co. v. Brown*, Okl. 1974, 519 P.2d 491, 495 *et seq.*, and effect of 'knowledge'. THIS CASE WAS CITED BY APPELLEE IN ITS REPLY BRIEF, PAGE 6, SO IT KNEW ABOUT THE CASE 8

The assertion and contention of appellee in briefs, both in the Trial Court and this Court, that the intent question, issue, or matter, was a '*defense*', in light of appellee's knowledge, actual or constructive, was untenable, and was frivolous 9

VI.

THE APPELLEE LACKED STANDING TO CLAIM THE USE OF 12 USC § 1823(e) AND THE *D'OENCH* CASE DOCTRINE, ("TWO FEDERAL LAWS") 10

THE APPELLEE'S CLAIM BASED UPON THESE TWO FEDERAL LAWS FAILED TO PRESENT A JUSTICIABLE MATTER TO THE TRIAL COURT 10

THE TRIAL COURT LACKED JURISDICTION TO GRANT APPELLEE ANY RELIEF AUTHORIZED BY THESE TWO FEDERAL CLAIMS 10

ALL RELIEF THE TRIAL COURT GRANTED TO APPELLEE UNDER THESE TWO FEDERAL LAWS WAS *CORUM NON JUDICE* AND NULL AND VOID 10

Two major complaints are stated in paragraph one of page 11 11

No law limits the time and place of raising 'standing to sue', *Matter of Estate of Doan*, Okl. 1986, 727 P.2d 574, 576 11

In 'standing to sue' questions, there must be a petition to construe, *Independent School Dist. No. 9 v. Glass*, Okl. 1982, 639 P.2d 1233, 1237. THERE WAS NO PETITION IN THIS CASE FOR THE TRIAL COURT TO CONSTRUE 11

Jurisdiction in INVOKED by a pleading, usually a petition. *Howard v. Duncan*, 1933, 163 Okl. 142, 145 21 P.2d 489 11

Title 12 OSA § 2008 provides for the use of a 'petition', not briefs 12

Cited and quoted is § 338, page 628, Freeman of Judgments, 5th Edition. Substance of the quote: In a pending case with jurisdiction, if one desires other different relief, one must ask for it by petition. Failure to do so is fatal to the relief secured but never sought 12

Freeman, § 338 is cited in *Fitzsimmons v. Oklahoma City*, 1942, 192 Okl. 248, 250, 135 P.2d 340, 343. Fitzsimmons contains a list of Oklahoma cases where there is, in the same judgment, valid and void parts 12

Although the Trial Court had jurisdiction of a statutory case class, its telephone failed to ring for lack of a pleading. The trial court could NOT answer a telephone that never did ring 12

Subject matter jurisdiction can never be conferred by waiver or consent. *Osage Oil & Refining, supra* 12

It is a general rule that when a court of general jurisdiction proceeds under a special statute, it is a court of limited jurisdiction for the purpose of that proceeding, and its jurisdiction must affirmatively appear. *Id., supra* 12

A federal statutory law claim, under the rule of *Glass* and *Osage* had to be pled in order to invoke the Trial Court's jurisdiction 12

For lack of any pleading—especially a petition—the appellee had no standing to sue—a subject matter jurisdictional defect. All relief granted by the Trial Court under § 1823(e) and the *D'Oench* case doctrine was *corum non judice* and null and void and unconstitutional under the 'due process' clauses of both the US and Oklahoma Constitutions. *Scott v. McNeal*, 1904, 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896. The summary judgment operates upon appellants' property rights 12

In the *Glass* case, *supra*, this Court addressed standing to sue on issues arising from statutes. If the statute is NOT APPLICABLE, there is no standing 12

Section 1823(e) and *D'Oench* case doctrine are NOT applicable 12,13

Where is the harm? Where are the 'side agreements' that would mislead the examiner? The *Langley* case says harm comes from those 'unknown' 'collateral' 'side agreements' that the first examiner would never know about. Where are they? The INTENT QUESTION arises from the loan asset papers. They were for the examiner to see 14

Riverside Park Realty Co. v. FDIC, supra. Langley v. FDIC, 1988, 484 U.S. 86, 108 S.Ct. 60, 74 L.Ed.2d 63, *D'Oench* case doctrine, § 1823(e) 14

Whether the briefed federal non-common law claim stated justiciable matter need not be decided, since briefs do not create standing to sue 14

The above makes it unnecessary to decide any of appellee's briefed claims in support of jurisdiction for the federal non-common law relief granted 15

VII.

THE FEDERAL DEPOSIT INSURANCE ACT OF 1950, AS AMENDED BY § 1823(e) AND THE *D'OENCH* CASE AND ITS PROGENY HAVE NO APPLICATION TO THIS CASE 15

THESE FEDERAL LAWS HAVE NOT PRE-EMPTED APPLICABLE OKLAHOMA LAW 15

ALL RELIEF GRANTED APPELLEE AGAINST APPELLANTS BY THE TRIAL COURT, WAS NULL AND VOID FOR LACK OF SUBJECT MATTER JURISDICTION 15

ALL RELIEF DENIED TO APPELLANTS UNDER OKLAHOMA LAW WAS A BREACH OF A MANDATORY DUTY OF THE TRIAL COURT 15

THE *IN REM* FORECLOSURE RELIEF GRANTED BY THE TRIAL COURT WAS JURISDICTIONALLY VALID 15

THE VALID AND VOID RELIEF WAS SUFFICIENTLY SEPARABLE. THE VOID RELIEF DOES NOT RENDER THE VALID RELIEF VOID 15

If the policy of the FDIC Deposit Insurance Act of 1950, of which § 1823(e) is a part, and which is the basis of the *D'Oench* case and its progeny, was a policy that was intended by Congress to render indisputable all matter arising directly from loan asset papers, such policy would render the loan asset papers unenforceable for lack of 'mutuality of contract' 14,15

Ash v. Chas F. Noble Oil & Gas Co., 1925, 96 Okl. 211, 214, 223 P. 175; *Wood & Co. v. Van Deursen*, 1926, 122 Okl. 19, 20, 250 P. 524, WORDS & PHRASES, 1961, Vol. 27A, pg. 735, *Fiedler, Inc. v. Coast Finance Co.*, 129 N.J. Eq. 161, 18 A.2d 268, 135 ALR 273, 277 16

There can be partial pre-emption. Pre-emption requires an explicit conflict between Oklahoma and federal law 16

Savage v. Jones, 1911, 225 U.S. 501, 533, 32 S.Ct. 715, 725, 51 L.Ed. 1182; *Skiriotes v. Floriday*, 1941, 313 U.S. 69, 61 S.Ct. 924, 928, 85 L.Ed. 1193 16

The policies of the FDIC Insurance Act, of which § 1823(e) is a part, and the gist of the *D'Oench* case and its progeny do not remotely purport to 'explicitly conflict' with the burden of proof law of Oklahoma or Oklahoma's doctrine of 'mutuality of contract' and the right of contracting parties to dispute the intent found in their written contracts 16

These federal laws DO PRE-EMPT Oklahoma law that provides that the intended affirmative 'side agreements' or collateral 'inequitable matter' were 'defenses' that would harm the deposit insurance fund by diminishing or defeating the right of FDIC 16

The bench case intent dispute arises directly from and out of the loan asset papers. They are not 'side agreements'. They are not 'collateral inequitable conduct' 17

Riverside Park Realty Co. vs. FDIC, supra 17

Section 13(e), Rules of the Dist. Courts, has been by the trial court violated. The sub-section means and refers to Oklahoma law—not federal 17

Since these federal laws have no factual application to this case, even if a petition had existed, there would have been no standing to sue and no justiciable matter presented thereby 17

La Bellman v. Gleason & Sanders, Inc., Okl. 1966, 418 P.2d 949, 953 and 956, has application to this case 17,18

See also, *Central National Oil Co. v. Continental Supply Co.*, 1926, 119 Okl. 198, 193, 249 P.347 18
Standard Sav. & Loan vs. Anthony Wholesale Gro. Co., 1916, 62 Okl. 242, 244, 162 P. 451, LRA 1917D 1029; *Fitzsimmons vs. Oklahoma City*, 1942 192 Okl. 248, 250, 135 P.2d 340, 343 19

VIII.

APPELLEE HAD NO STANDING TO INVOKCE RULE 13 BY THE USE OF BRIEFS SUPPORTED BY FEDERAL LAW. SUB SECTION "(e)" RESTRICTED BY THE TRIAL COURT'S AUTHORITY TO OKLAHOMA LAW. THE

TRIAL COURT'S THEN EXISTING JURISDICTION WAS LIMITED TO AN OKLAHOMA LAW COMMON LAW CONTRACT CLAIM 19

FOR LACK OF SUCH STANDING, THE TRIAL COURT NEVER ACQUIRED ANY SUMMARY JUDGMENT POWER AND AUTHORITY TO SUMMARILY PROCEED TO JUDGMENT AGAINST THE APPELLANTS. IT LACKED JURISDICTION OF ANY FEDERAL LAW SUBJECT MATTER.....19

IN ADDITION, AS TO THE APPELLANTS, THE MOTION AND BRIEFS NEVER PRESENTED TO THE TRIAL COURT A JUSTICIABLE MATTER. THE FEDERAL LAWS IN QUESTION HAD NO APPLICATION TO THE OKLAHOMA COMMON LAW CONTRACT SUBJECT MATTER THAN BEFORE THE TRIAL COURT. THE MOTION AND BRIEFS MERELY PRESENTED ABSTRACT AND HYPOTHETICAL QUESTIONS 19

D'Oench case and its progeny. *Riverside Park Realty Co. v. FDIC, supra.* The authorities cited in Part Vi, *supra* 19

IX.

SUMMARY AND CLOSING STATEMENT 19-23

(The required conclusions are stated on pages 22-23)

X.

RELIEF REQUESTED 23

CERTTIFICATE OF SERVICE 23

A-146

ITEM # 8

IN THE COURT OF APPEALS, DIVISION 4
STATE OF OKLAHOMA

FILED
DEC 3 1991

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Appellee,	)	
vs.	)	No. 74,513
MIKE BARNETT, JOHN R. HELTON, JEFF L. HIRZEL, JAMES W. LITTLE, KENNETH E. MILLER, PHILLIP E. SNODDY, MARVIN L. WYNN, each individually and as a Partner of SOONER VISTA, a partnership,	)	NOT FOR PUBLICATION
Appellants.	)	

APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY, OKLAHOMA

Honorable Sam C. Fullerton, Trial Judge

R. Mark Petrich
Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C.
Tulsa, Oklahoma — For Appellee

Robert M. Helton
Wichita Falls, Texas — For Appellants

Jeff L. Hirzel
Guthrie, Oklahoma — Pro Se

MEMORANDUM OPINION

REIF, J.

This appeal concerns the liability of certain general partners on two notes and a mortgage of the Sooner Vista partnership. There was no dispute that the notes were in default and that the receiver for the federally insured lender-mortgagee was entitled to foreclose on the property securing the notes. The trial court granted summary judgment on the notes and mortgage and held that all the general partners named as defendants were jointly and severally liable for any deficiency following foreclosure. General partners, Barnett, Helton, Hirzel, Little, Miller, Snoddy and Wynn, asked the trial court to reconsider the question of their joint and several liability. The trial court overruled their motion to reconsider from which they bring this appeal.

In the trial court, these general partners contested their joint and several liability on alternative grounds. First, they contended that they were released from liability on the original partnership note when the lender-mortgagee accepted a second note with a higher interest rate *after* their withdrawal from the partnership. They asserted the this second note constituted a novation between the remaining partners and the lender-mortgagee. They also asserted that the lender-mortgagee was estopped from seeking recovery from them because it accepted the second higher interest note knowing that they were no longer part-

ners. Lastly, they urged that any individual liability that each may have for a deficiency would be on a pro rata basis rather than joint and several. They based this on a provision in their guaranty agreements limiting their guarantor liability to ten percent of the partnership debt.

All of the foregoing defenses were raised in the contesting partners' original answer, and were reasserted in their answer to the amended petition *except* the ten percent pro rata liability defenses. In responding to the motion for summary judgment, the *only* factual controversy that they specifically raised was "whether Note 1 [the original partnership note] has been extinguished by the giving of Note 2 [the second higher interest rate note] which precludes the entry of summary judgment." The contesting partners *did not file any affidavits or other evidentiary materials* to demonstrate a controversy on this single issue that they raised. Their motion to reconsider and supporting brief properly sought review of the novation issue raised on summary judgment, but *added* the issue of pro rata liability that had been omitted from their amended answer and their response to the motion for summary judgment. The only evidentiary material submitted in support of the motion to reconsider concerned the question of pro rata liability. A supplement to their motion to reconsider raised yet *another* issue that was omitted from their response to the summary judgment; that is, the release of another general partner operated to release them as well. They offered evidentiary material to support this *new* issue, but *nothing to support the single issue of novation raised in their response* to the motion for summary judgment.

The original petition in error of the contesting partners did *not* assign error or raise any issue concerning their defense of novation, but instead propounded various errors concerning the issue of pro rata liability. The amended peti-

tion in error added several contentions that the summary judgment violated the contesting partners' constitutional rights but also failed to specifically raise any question concerning the single issue of novation raised in the motion for summary judgment.

The state of the record in this case makes it unnecessary to address the issues briefed by the contesting partners, because none of the issues raised and briefed on appeal were properly preserved or presented for review and disposition. The single issue of novation raised in the response to the motion for summary judgment was not raised on appeal, while the question of pro rata liability presented on appeal was not raised in the motion for summary judgment before the trial court.[1] Even if we held that the issue of novation was encompassed in the *general* appellate propositions that a controversy existed about the parties' intent, any question of the parties' intent was to be determined by the trial court as a matter of law from the

---

[1] The burdens on summary judgment as well as the consequences for failing to meet those burdens are clearly delineated by District Court Rule 13, 12 O.S. Supp. 1990, ch. 2, app. First, under 13(b) a party opposing a summary judgment "shall serve on the moving party and file with the court clerk . . . a concise written statement of the material facts as to which . . . a genuine issue exists and the reasons for denying the motion." This provision also requires the adverse party to file admissible evidentiary materials to support the denial and prohibits the adverse party from relying on the allegations or denials in his pleading alone. The response "shall set forth and number each specific material fact which is claimed to be in controversy" with reference to the evidentiary materials to support the dispute on that issue. All material facts set forth by the moving party which are supported by admissible evidence "shall be deemed admitted for the purpose of summary judgment unless specifically controverted." The concluding provision of 13(b) addresses the consequences of a deficient summary judgment response on appeal: "If the motion for judgment is granted, the party or parties opposing the motion cannot on appeal rely on any fact or material that is not referred to or included in the [response] in order to show that a substantial controversy exists."

parties' written instruments alone. *See Mercury Investment Co. v. F.W. Woolworth Co.*, 706 P.2d 523, 529 (Okla. 1985). In view of the foregoing, we are constrained to affirm the trial court.

AFFIRMED.

BACON, V.C.J., and STUBBLEFIELD, J., concur.

December 3, 1991

A-151

ITEM # 9

IN THE COURT OF APPEALS
DIVISION - 4
STATE OF OKLAHOMA

FILED
DEC 23, 1991

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver,	)	
Appellee,	)	
vs.	)	No. 74,513
MIKE BARNETT, ET AL.,	)	
Appellants.	)	

PETITION FOR REHEARING

APPEAL FROM THE DISTRICT COURT
OF DELAWARE COUNTY, OKLAHOMA, CASE NO.
C-85-371
HONORABLE SAM C. FULLERTON TRIAL JUDGE

MORTGAGE FORECLOSURE
AND SUIT ON NOTES
AND GUARANTIES

R. M. HELTON, OBA #4066
Solo practitioner,
713 Lamar Street,
Wichita Falls, TX 76301,
Tel - 817-723-0729 & 817-766-2828

Attorney for appellants.

IN THE COURT OF APPEALS
DIVISION 4

STATE OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Appellee,	)	
vs.	)	No. 74,513
MIKE BARNETT, JOHN R. HELTON, JEFF L. HIRZEL, JAMES W. LITTLE, KENNETH E. MILLER, PHILLIP E. SNODDY, MARVIN L. WYNN, each individually and as a Partner of SOONER VISTA, a partnership,	)	
Appellants.	)	

TO THE HONORABLE COURT OF APPEALS, DIVISION 4:

PETITION FOR REHEARING
(Rule 3.9)

The appellants, named in the caption hereof, move the Court to rehear this case and upon a consideration of the errors herein set forth withdraw its affirmance order and memorandum opinion, and thereafter review and consider the specified alleged errors assigned in the amended petition in error and brief of appellants in support thereof and thereupon render such order as is just and right, supported by a proper written opinion.

Specification of Errors

Error No. 1 (Not requested)

Error No. 2 (Not requested)

Error No. 3 (Not requested)

Error No. 4 (Not requested)

Error No. 5 (Not requested)

Error No. 6 (Not requested)

Error No. 7

The Appellant's Claim of Reviewable Fundamental *Corum Non Judice* Action of the Trial Court.

Encompassed in this claimed error and as a result of this Court's refusal to correct the trial Court's error, this Court will be guilty of approving the trial Court's denial of 14th Amendment due process of law owed by Oklahoma to the appellants by the 14th Amendment.

Oklahoma will be as guilty of depriving appellants due process of law as was the State of Washington in the case of *Scott v. McNeal*, decided in 1904, reported in 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896.

Oklahoma's District Court system is a state wide Oklahoma instrumentality of its government of which the District Court of Delaware County is a unit. When the District Court of Delaware County acts, Oklahoma, as a state, acts. The 14th Amendment is a U.S. Constitutional command to Oklahoma. The com-

> mand is: Oklahoma, you shall not deny to a U.S. Citizen or an inhabitant within its jurisdiction, due process of law, as applied by the U.S. Supreme Court. That Court, in *Scott v. McNeal*, said that state court judgments which affect property, which are *corum non judice*, are void and denies to that property owner 14th Amendment due process of law.

It matters not that this error was not claimed to be a reviewable question or issues in appellants' amended petition in error. [1] This claimed error involves the lack of subject matter judicial power and jurisdiction of the trial Court. It is of an error quality that cannot be waived. It is about a subject that cannot be consented to. This is the reason for the rule. This is why it is error so fundamental that review of it can be demanded at any stage of this case in any court to which the case is taken by appeal.

The only constraint upon reviewability by this Court does not exist. This Court has before it a certified record of the trial court's proceedings which contains all of the material and relevant parts of the trial court's 'judgment roll'. Therefrom, the trial court's *corum non judice* action can be examined by this Court.

As the certified record of this case reflects, no fact trial was conducted. Only a summary judgment trial took place. No stenographic record of the oral argument before Judge FULLERTON was made of the hearing of September 6, 1989. In the record is a stenographic transcription of the oral argument before Judge FULLERTON on November 1, 1989, when the appellants' motion to

---

[1] Appellants believe Exhibit 'C', Petition in Error, §§ 3 and 4, are sufficient to include a *corum non judice* claim of error. If not, in the alternative, we show that a *corum non judice* judgment error is reviewable as fundamental even though not specified as such in the Petiton in Error.

reconsider was heard. On November 8, 1989, Judge FULLERTON filed his personally drafted order refusing to reconsider.

A construction of the order affirming and the opinion this Court reflects that it precludes appellants of a review in this Court of fundamental *corum non judice* action of the trial Court. Unless reviewed here and corrected by granting appellants a rehearing, the fundamental *corum non judice* action of the trial Court will become an error of this Court, pointed out to this Court, yet uncorrected. This Court's refusal to review such fundamental error, after notice thereof, will be a continuation of the same error of the trial Court.

Encompassed in this claimed error and as a result of this Court's refusal to correct the trial court's error, this Court will be guilty of approving the trial Court's error, this Court will be guilty of approving the trial Court's denial of 14th Amendment due process of law owed by Oklahoma under the 14th Amendment to the appellants.

Error No. 8

This Court has committed error in ordering the case 'affirmed'. Its order should be 'Dismissed, No Jurisdiction'. The Court found and concluded that appellants presented a trial Court certified record that presented no reviewable trial Court points of error. One subject matter of this Court's jurisdiction is a trial Court certified record containing reviewable error. An order, 'case affirmed', would support a *res judicata* plea to an action in another Court attacking as void, the trial Court's summary judgment. An order, 'Dismissed, No Jurisdiction' would not support a *res judicata* plea to another action in another court.

This completes the Petition For Rehearing.

Relief Requested

The relief requested is stated in the opening paragraph on page 1.

Respectfully submitted

/s/ R. M. Helton

R. M. HELTON, OBA # 4066,
Solo practitioner,
713 Lamar Street,
Wichita Falls, TX 76301,
Tel # 817-723-0729 & 817-766-2828,
Attorney for appellants.

ITEM # 10

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

FILED
FEB 18 1992

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

74,513 FEDERAL DEPOSIT INSURANCE CORPORATION, et al., Appellee, v. MIKE BARNETT, et al., Appellants.

Appellants' Petition for Rehearing is denied.

Done in conference this 14th day of February, 1992.

/s/ Kenneth D. Bacon

KENNETH D. BACON
Chief Judge
Court of Appeals

A-158

ITEM # 11

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
3-12-92

MIKE BARNETT, ET AL.,	)	
	)	
APPELLANTS,	)	
	)	
vs.	)	NO. 74,513
	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver,	)	
	)	
APPELLEE.	)	

PETITION FOR CERTIORARI

TO THE HONORABLE CHIEF JUSTICE OF SAID COURT:

The seven appellants in this case are pleased to hereby present their Petition For Certiorari to the Court of Appeals, Division 4, agreeable to Rule 3.14, and hereby request appellate review by this Court of the decision and Opinion of said appeals Court.

1. The opinion of the Honorable Court of Appeals was not published. A copy thereof is appended to each copy of this petition.

2. December 3, 1992, is the date of the opinion below. February 18, 1992, is the date of the Order Refusing to Rehear.

3. The exercise of this Court's power of supervision is requested.

Part 1.

THE COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

1. The most important departure of the Court of Appeals has been its failure to recognize that constitutional fundamental error had occurred in the trial court, and *its refusal to review* the trial Court's summary judgment. Whether or not the certified transcript of the record proper reflected constitutional fundamental error is immaterial. It can be raised for the first time at any stage of appellate review. It cannot be waived or consented to. The alleged error is limited to the appellants.

2. The Court of Appeals is the first Court that appellants have had an opportunity to present their constitutional claims to.

3. Art. VI, § 2, U.S. Constitution commanded that this Court of Appeals review the constitutional fundamental error presented to it by the appellants. The Court of Appeal's decision to refuse to review this case since it involved 14th Amendment due process constitues *extreme* departure from the Court's accepted and usual course of judicial proceedings. Refusal to review by the Oklahoma Supreme Court will cast Oklahoma into the same position that the State of Washington found itself in *Scott v. McNeal*, 1904, 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896.

Part 2.

THE COURT OF APPEALS HAS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY THE TRIAL COURT.

1. A great coequal important departure of the Court of Appeals is the result of its refusal to review the trial Court's summary judgment. As a result of its refusal to review the trial Court's summary judgment, the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceeding by the trial Court. The trial Court had committed constitutional fundamental error in its rendition of a final summary judgment against the appellants. The trial court was required to render a judgment that appellee 'take nothing' against appellants. In error, jurisdictional in nature, it rendered a bifrocated money judgment against each appellant because it applied *nonapplicable federal law, when it should have applied applicable Oklahoma law.* One result of its misapplication of law was, that appellee was never required by the trial court to prove that its *probata* supported its *allegata*, with respect to appellants' liability. Appellee, under Oklahoma law, had the *onus probandi* to prove that its *exhibited* commercial papers generated the specific money liability that appellee alleged that they generated. The trial Court *held* that the D'Oench-Duhme Docrine of the U.S. Supreme Court and Title 12 U.S.C.A. § 1383(e), precluded and estopped the appellants from all right, under Oklahoma law, to have the trial Court require that appellee comply with its onus probandi and prove that its *probata* supported its allegata with respect to appellants' liability. This decision was an ultra vires act of the trial Court and therefor was an act of the trial Court that was *corum non judice* and void.

This void decision produced the final summary judgment. It was the fruit of the void decision. Thus, the final summary judgment was also void, as against the appellants. Under Rule 13(e) [RDCO] the only final summary judgment that the trial court was authorized to make was a 'take nothing' judgment against the appellee. The probata of appellee wholly and totally failed to sustain appellee's allegata of the appellants' liability. It has not yet ended!! The trial Court's final summary judgment operated to effect the property rights of each appellant. The due process clause of the 14th Amendment, U.S. Constitution, commands Oklahoma and its Courts, as judicial agencies of the State, to *NOT* render judgments that affect the property rights of the judgment defendant that are void for lack of jurisdiction. *Scott v. McNeal, supra,* has so held. Oklahoma's Constitution is to the same effect. Thus, the trial court's void summary judgment against the appellants is error of a very serious constitutional nature.

This Court's discretion to review this case is mandated by Art. VI. of the U.S. Constitution. This Court, as it was of the Court of Appeals, has the U.S. Constitutional duty to preserve and protect the U.S. Constitution from all intruders—even the trial Courts of Oklahoma.

QUESTIONS PRESENTED

1

DOES THE CERTIFIED TRANSCRIPT OF THE RECORD PROPER REFLECT THAT IT CONTAINS A QUESTION OF THE TRAIL COURT'S LACK OF JURISDICTION TO RENDER A SUMMARY JUDGMENT AGAINST APPELLANTS?

2

IF SO, WAS NOT HTE JUDGMENT AND OPINION OF THE COURT OF APPEALS MANIFESTLY WRONG?

3

WAS THE D'OENCH-DUHME DOCTRINE OF THE U.S. SUPREME COURT AND TITLE 12 U.S.C.A. § 1382(e), LAW THAT WAS INAPPLICABLE TO THIS CASE?

4

IF SO, DID THE TRIAL COURT LACK JURISDICTION TO RENDER THE FINAL SUMMARY JUDGMENT?

FACTS SUPPORTING REASONS TO GRANT THE WRIT

The first fact supporting the reason to grant the writ is the fact that the appeal involves a fundamental U.S. constitutional wuestion that has arisen in a state Court. Supporting that fact is the command arising from Art. Vi, ¶ 2 of the U.S. Constitution. Therein the Judges of the Courts of the states are notified that the U.S. Constitution is the Supreme Law of the land. In 1904, in Scott v. McNeal, supra, the U.S. Supreme Court gave the states notice that judgments of state Courts rendered without jurisdiction that affected property violated due process of law, since the 14th Amendment was a limitation upon the judicial power of states. The case informed the states that their judicial departments were as much bound by the mendment as were the legislative and executive departments.

The second arises from the State-Federal relationship. The U.S. Supreme Court has established a policy that it much prefers that the highest Court of a state have the first opportunity to rule upon a U.S. Constitutional question, where it is asserted by a person in a state Court that state action has invaded the U.S. Constitution. Such opportunity is in this case hereby offered to Oklahoma's highest Court. There is not any other fact needed.

ARGUMENT AMPLIFYING REASONS FOR GRANTING THE WRIT.

Part 1.

The D'Oench-Duhme Doctrine of the U.S. Supreme Court and Title 12 U.S.C.A. § 1823(e) are federal laws that have no application to this case.

1978, *Riverside Park Realty Co. v. F.D.I.C.*, 465 F.Supp. 305, D.C., M.D.Tenn., (6th Cir.), Chief Dist. Judge Morton.

1981, *Howell v. Continental Credit Corp.*, 655 F.2d 743, 7th Cir., Judge Pell.

1984, *F.D.I.C. v. Merchants Nat. Bank of Mobile*, 725 F.2d 634, 11th Cir., Judge Godbold.

1984, *F.D.I.C. v. Panelfab Puerto Rico, Inc.*, 739 F.2d 26, 1st Cir., Judge Pettine.

1986, *F.D.I.C. v. Rivera-Arrovo*, 645 F.Supp. 511, D.C. Puerto Rico. (1st Cir.), Judge Cerezo.

Quotations are in Appendix No. 1, *infra.*

In these 5 cases, the central theme of non-applicability of the above federal laws is that in no possible way could F.D.I.C. suffer harm to the deposit insurance fund. In one case, *as in this case,* F.D.I.C. was found guilty of attempting to *add money* to its asset. Judge Fullerton

held and decided that federal law precluded and estopped appellants from requesting him to decide the *onus probani* of appellee of appellants' liability, Oklahoma law. In his order refusing to reconsider, he candidly and courageously wrote, in substance, I cannot decide that question. This federal law bars appellants' request to me. In his order, he said that he had been requested by the appellants to do this. non-Applicability of this federal law *destroyed for more than one reason. Applicability vel non* involved a statutory limited special jurisdiction *case class* of subject-matter jurisdiction. *Jurisdictional facts* of applicability were not present. The question was *not* whether something had diminished the value of the asset. The question was what was the *original* value of the asset on May 3, 1983. Another question was whether a rule of trial precedure of Oklahoma applied. *Oklahoma* procedural law *was the actor.* There are no *human actors* in this case. That Oklahoma procedural law was the actor is the reason that this bench cae is a stronger case than any of the 5 cited cases. *Next,* there was *no pleading* filed that telephoned Judge Fullerton that a special limited statutory jurisdiction *claim* for relief had been filed. His Honor 'sleeps' until his phone rings. He had the jurisdiction *case class,* but his telephone had to ring, invoking it. Briefs will not ring the telephone!!! *Next,* no *justiciable* issue can arise for adjudication from a non-applicable statutory source of jurisdiction. *Next,* clainamts who attempt to invoke a non-applicable statute have no standing to sue. justiciability and standing to sue, separately, *are* jurisdictional requirements. Authorities make up Appendix No. 2, *infra.*

> Jurisdictional facts must appear in this certified transcript of the record proper to support Judge Fullerton's application of federal statutory law. They do not appear in the record of this case.

The previously cited 5 federal court cases provide *examples of cae facts that fail to constitute the jurisdictional facts.* The jurisdictional facts are specified by federal law. *The result of failed federal law jurisdictional facts is governed by Oklahoma law.* When federal law jurisdictional fact *exist,* the federal law in question then becomes Oklahoma law and applicable. 12 U.S.C.A. § 1819 (4th). When federal law jurisdictional facts *do not exist, federal law does not control the results*—Oklahoma law does. *The lack of federal law jurisdictional facts in tthis case is settled by the cited 5 federal court cases.* By the law of Oklahoma, cited and quoted in Appendix No. 2, *infra,* the decision or order of Judge Fullerton that federal law precluded and estopped appellants from requesting him to apply the Oklahoma law of *omus probandi* to appellee's allegations of appellants' liability was an *ultra vires* act, *corum non judice* and void. *Its fruit,* the final summary judgment against appelants was also null and void. 'It is bad everywhere and good nowhere', a rule so often stated, that it needs no citation.

The summary judgment, until declared null and void, operates and affects the property of appellants. Because a lack of subject matter jurisdiction produced the summary judgment, it was state action that deprived appellants of 14th Amendment 'due process of law'. *Scott v. McNeal,* supra. The case record is persuasive, pervasive fundamental constitutional error and reviewable by this Court, the

opinion of the Court of Appeals to the contrary notwithstanding.

Respectfully submitted

/s/ R. M. Helton

R. M. HELTON,
OBA # 4066,
713 Lamar Street,
Wichita Falls, TX, 76301,
Solo Practitioner,
Tel. No. 1-817-723-0729
1-817-766-2828,
Counsel for Appellants.

ITEM # 12

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Filed
Wednesday, September 23, 1992

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

74,513 **Federal Deposit Insurance Corp. etc. v. Mike Barnett et al.**
Certiorari denied.
CONCUR: Hodges, V.C.J., Simms, Wilson, Summers, Watt, JJ.
DISSENT: Opala, C.J., Lavender, Hargrove, Kauger, JJ.

75,311 **In the Matter of the Estate of Alta Booth, ormerly Alta White, deceased; Theda M.ier v. Everett Lake et al.**
Certiorari denied.
CONCUR: All Jutices concur.

75,279 **Harold Massey and Dorothy Massey v. Farmers Insurance Group etc.**
Rehearing denied.
CONCUR: Hodges, V.C.J., Lavender, Simms, Hargrave, Wilson, Summers, Watt, JJ.
DISSENT: Opala, C.J.
NOT PARTICIPATING: Kauger, J.

76,070 **Putnam Plaza Company etc. v. American Guaranty Title Company.**
Certiorari denied.
CONCUR: All Justices concur.

76,399 **The F & M Bank & Trust Company etc. v. Jack B. Sellers etc.**
Certiorari denied.
CONCUR: Lavender, Simms, WIlson, Watt, JJ., Johnson, S.J.
DISSENT: Hodges, V.C.J., Hargrave, Kauger, Summers, JJ.

Charles A. Johnson, S.J., sitting by designation in lieu of Opala, C.J., who certified his disqualification.

76,806 **Construction Services Division et al. v. MGI, Inc. etc. et al.**
Certioriri denied.
CONCUR: Opala, C.J., Lavender, Simms, Wilson, Kauger, Summers, Watt, JJ.
DISSENT: Hargrave, J.

77,161 **Hope Lodes v. State of Oklahoma ex rel Oklahoma Real Estate Commission.**
Certiorari denied.
CONCUR: All Justices concur.